

<b>Crosby v Montefiore Med. Ctr.</b>
2014 NY Slip Op 32714(U)
February 18, 2014
Sup Ct, Bronx County
Docket Number: 300681/10
Judge: Douglas E. McKeon
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX - PART IA-19A

-----X  
YOLANDA CROSBY,

Plaintiff(s)

- against -

MONTEFIORE MEDICAL CENTER and BETH  
ABRAHAM HEALTH SERVICES,

Defendant(s)  
-----X

DECISION/ORDER  
INDEX NO: 300681/10

Present:  
**DOUGLAS E. McKEON**  
J.S.C.

Motion is decided in accordance with the annexed memorandum decision.

Dated: 2/18/14

  
\_\_\_\_\_  
Douglas E. McKeon, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX - PART IA-19A

-----X  
YOLANDA CROSBY,

Plaintiff(s)

- against -

INDEX NO: 300681/10

MONTEFIORE MEDICAL CENTER and BETH  
ABRAHAM HEALTH SERVICES,

MEMORANDUM DECISION

Defendant(s)

-----X

**HON. DOUGLAS E. McKEON**

Motion by Beth Abraham Health Services to preclude Doctors Barry Root, M.D., Alan Leiken, Ph.D. and Debra Dwyer, Ph.D. from offering expert testimony at the trial of this action is granted to the following limited extent:

This is a bedsore case which has been conferenced before the undersigned on numerous occasions. During the course of the litigation (several years in fact), plaintiff's claim was always simple, straightforward and the same: Defendants failed to take appropriate measures to preserve plaintiff's skin integrity and she developed a bedsore. However, things changed after the case was scheduled for trial. Plaintiff served a series of so-called "supplemental" bills of particulars alleging, for the first time, that plaintiff's bedsore made it impossible for her to undergo physical therapy and that, in any event, defendants failed to implement a physical therapy plan, thereby diminishing plaintiff's chances for a better quality of life and requiring

increased future medical treatment. To supplement and explain plaintiff's new damage claims, plaintiff offers a life care plan with significant future medical costs, never previously alleged.

The allegation that plaintiff could not undergo physical therapy because of her bed sore was asserted, for the first time, in a supplemental bill of particulars, dated August 22, 2013; indeed, at no time previously had plaintiff even used the words "physical therapy" in a bill of particulars. Quite frankly, this Court would not, if asked to do so, characterize this document as a "supplemental" bill of particulars since it asserts new claims, which are more appropriately described as amendments to the bill of particulars. Nonetheless, at the request of one of the defendants, after service of the August 22 bill of particulars, a further deposition of plaintiff was granted and conducted in September, 2013. Hence, defendants had the opportunity to flush out the specifics of this new claim, and are, therefore, hard pressed to claim prejudice or surprise.

However, at about the time of the holding of the deposition, plaintiff served yet another "supplemental" bill of particulars, asserting, for the first time, defendants failure to implement a program of physical therapy with claims of special damages flowing therefrom. Additionally, plaintiff served the 3101(d) expert disclosures relative to Doctors Root, Leiken and Dwyer which is the subject of this motion.

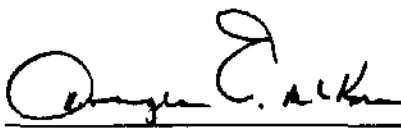
In light of the further deposition of plaintiff in September, 2013 on the claims concerning plaintiff's inability to engage in physical therapy, this Court will not

preclude Dr. Root from testifying on that issue. However, he may not testify as to any claim by plaintiff that defendants failed to implement a physical therapy program. So, to be clear, Dr. Root's trial testimony is limited to plaintiff's claim that her bedsore prevented her from participating in physical therapy and deprived her of a chance to enhance the quality of her life as it relates to pain and suffering and loss of enjoyment of life. However, in all other respects, Dr. Root's expert disclosure is stricken and he is precluded from testifying about any other subject, including his life care plan. Hence, there is no need for the testimony of Drs. Leiken or Dwyer, economists, since the life care plan is inadmissible and there will be no need for future economic projections as to medical care.

Finally, defendant may identify and serve an appropriate 3101(d) response for an expert to rebut plaintiff's claims that she was unable to participate in physical therapy, diminishing the quality of her life, etc. This is a new claim and defendant should be given an opportunity to challenge it at trial.

So ordered.

Dated: *February 19, 2014*

  
Douglas E. McKeon, J.S.C.